IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DAN GOLUBIEWSKI and STEVEN CHECCHIA, individually and on behalf of all others similarly situated,	:	
v.	:	
DAVE INC.,	:	CASE NO. 3:22-CV-02077

TRANSCRIPT OF PROCEEDINGS

Oral Argument on Defendant's Motion to Compel Arbitration and Stay or Dismiss Proceedings

Held before the Honorable Karoline Mehalchick, Thursday, March 28, 2024, commencing at 1:06 p.m., via Zoom conference call.

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Proceedings recorded by machine shorthand; transcript produced by computer-aided transcription.

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(Proceedings commenced at 1:06 p.m.)

THE COURT: Defendant, this is your Motion, so take it away.

MR. TOTINO: Thank you, Your Honor. I've prepared a PowerPoint that I would like to put up with the argument. So if I can do that now?

THE COURT: Absolutely.

MR. TOTINO: Thank you. Are you able to see that, Your Honor?

THE COURT: I am. Thank you.

MR. TOTINO: Great. Thanks. Thank you for taking the time for this argument, Your Honor. Ed Totino representing Dave, Inc.

Dave is a financial technology company that, among other things, provided its members with no-interest, non-recourse cash advances through the Dave app. The whole point of the advances was to stop people from getting overdraft fees, to save them money.

Just so the record's clear, Dave no longer offers these advances. They now offer a new extra cash product that Plaintiff Checchia signed up for. It's a different product, but we can discuss that later.

So Mr. -- Plaintiff Golubiewski --

(The Zoom Recording announced that the recording was in progress.)

THE COURT: I'm sorry. Go ahead. We just hit record on it. I'm sorry.

MR. TOTINO: No problem. No problem. Thanks.

So Mr. Golubiewski, Plaintiff Dan Golubiewski, he downloaded the Dave app to his smart phone in June of 2019 and created an account with Dave. To do that, he had to subscribe to Dave, agreeing to a $1 per month membership fee. He had to provide his e-mail address, telephone number, first and last name, and create a password, and confirm his identity through two-factor authentication. And then he had to connect an external bank account to Dave and give Dave access to the historic transaction level detail on the bank account so the Dave app can work and let him know when he was running short on cash.

If you take a look up on the screen there, and this is all on the record, is that the screenshot of what -- what the screen looked like when Mr. Golubiewski signed up for Dave. It's always been substantially similar to that. So when he downloaded that app, it came up on the screen. It has a big button that says Join Dave. It says cost $1 per month. And under it, it says, By joining, I agree to Dave's privacy policy, TOS, E-sign, and electronic communication consent. And those hyperlinks are all underlined there.

Now Dave's terms of use, TOS, or terms of service always included an arbitration -- an agreement to arbitrate.

It's always been in there, Your Honor.

So in order to sign up, Mr. Golubiewski had to go through the process I spoke about earlier, put his phone number in there, hit Join Dave, and agree. And if you notice, the Join Dave button is a call-to-action because underneath, it says, By joining, I agree.

So after Mr. Golubiewski joined Dave, he paid Dave $21 in monthly subscription fees; he received 41 cash advances; he repaid 40 of those advances, but not the last one; he tipped Dave 39 times; and he received regular e-mails from Dave with links to Dave's terms.

Now let's talk about Plaintiff Steven Checchia because his facts are a little different.

So he downloaded the Dave app to his smart phone in November of 2017 and created an account with Dave. So to do so, he had to do the same thing that Mr. Golubiewski did. Subscribe to Dave, agreeing to pay the $1 monthly membership fee, provide his e-mail address, telephone number, and first and last name, create a password, confirm his identity through two-factor authentication. And then he had to connect an external bank account, just like Mr. Golubiewski did, so Dave could see what was going on with the finances and give him an alert that he's going to have an overdraft or may need cash.

Again, there's the screen that Mr. Golubiewski -- or Mr. Checchia signed up on. It's substantially similar,

much like the screen that Mr. Golubiewski signed up on. And again, it says, Join Dave, and underneath it, it says, By joining, I agree.

THE COURT: So -- but, Counsel, let me just, for clarification and so I fully understand it for the record, the court reporter. Those links state -- indicate privacy policy TOS, which I assume would stand for terms of service --

MR. TOTINO: Yes.

THE COURT: -- E-sign and electronic verification consent. There's nothing there that says anything, at least on the title of those links, related to arbitration, on the face of that.

MR. TOTINO: That's correct. If you click on the TOS link, it does, right at the top, I think in all caps, you agree to arbitrate. But there's nothing -- nothing right there because, as you can see, it doesn't say it there.

THE COURT: Right. Thank you.

MR. TOTINO: So after Mr. Checchia signed up for Dave this way, the legacy -- I'll call it the legacy Dave product, then in -- he paid $6 in monthly subscription fees; he received 20 advances; repaid 19 of those, and didn't pay the last one back; tipped Dave 12 times, and received regular e-mails from Dave with links to Dave's terms.

Then in November of 2022, Mr. Checchia signed up for and began using a new service offered by Dave called Extra

Cash. And to do that, he had to link a debit card, provide a home address, provide his date of birth, and provide a Social Security number.

Here's a screenshot of the screen for signing up for the Extra Cash. And to sign up for that, you can see Mr. Golubiewski would have to check the box there, and next to it, it says, By checking this, you agree to the deposit account agreement, Extra Cash account agreement, and Evolve privacy policy, and it also has a reference there to Dave's terms and conditions, which were the ones that Mr. Checchia previously agreed to and Mr. Golubiewski, as well. So that's referenced there, as well.

Now these hyperlinks, instead of being underlined, are in blue.

So -- now neither Mr. Golubiewski nor Mr. Checchia deny any of this. The only evidence they've submitted to the record is that they both say they don't remember being presented with or agreeing to the terms. They don't say what happened; they don't say what they did; they don't say anything. They don't deny getting the multiple e-mails that were sent. So there's no evidence in the record on that point, that they didn't get the e-mails.

So, you know, our position, Your Honor, is first of all, Plaintiffs had actual notice of the terms. They agreed to the terms when signing up for Dave. They used Dave's app

to receive dozens of cash advances. Any reasonable consumer is going to know if you're receiving cash advances, there are some terms governing your agreement. They gave Dave access to their bank accounts. I mean who is going to do that without terms. They received e-mails linking the terms. They don't deny that. And they had to know -- any reasonable consumer is going to know that if you're -- if you're entering into a financial relationship with a company, an ongoing financial relationship, there's terms and conditions governing that relationship.

Now, Plaintiff also had inquiry notice of the terms. Under the standard, you have -- Plaintiffs are on inquiry notice of the terms. If -- if the app put a reasonably prudent user on inquiry notice of the terms, importantly to consider, there is a case from California, which I think both sides agree that California law governs and is not different than other law.

THE COURT: Let me pause that for one second and just --

MR. TOTINO: Sure.

THE COURT: -- Mr. Abramowicz, on behalf of the Plaintiff, do you agree? Is there any dispute that California law would apply here?

MR. ABRAMOWICZ: So I think -- well, let me give two answers to that question.

So I think that the Court doesn't need to reach whether Pennsylvania law applies because even under California law, the notice inquiry fails. But I think if the Court needs to reach that question, Pennsylvania law would apply.

THE COURT: Okay. And we can -- we'll hear more -- we'll hear more from you on that after Defendants get through with their presentation. But go ahead.

MR. TOTINO: Thank you, Your Honor.

So for California law, there's BD versus Blizzard Entertainment case. It talks about the full context that a transaction has to be examined to see what -- what would put the consumer on an inquiry notice of the terms. And then we also have the Edmundson versus Klarna case from the Second Circuit of a -- a very recent case, actually, end of last year. And in that case, the Court noted that, you know, California -- it talked about California law; it talked about New York law; it talked about Connecticut law; and it said the laws in all the states are pretty much in agreement as to what constitutes sufficient notice. And they also talked about the totality of the circumstances.

So it's the same as the full context transaction that California law discusses.

Now in the Dave app, it did put Plaintiffs on inquiry notice on unclear screens. We looked at the screen before. There wasn't much on them. And it said at the

bottom, By joining, I agree to Dave's privacy policy, TOS, E-sign, and electronics communications consent. And for Extra Cash, the app says next to a cash box, as we saw, that by checking this, you agree.

But those apps both notified the Plaintiffs that -- that they were agreeing when they joined Dave. Each of them had links to various agreements. And, you know, Courts in California and elsewhere have enforced agreements with similar layouts. Here's the Blizzard case agreement here -- agreement from the Blizzard case I just mentioned. If you notice, this is much more sort of less apparent, less reasonably conspicuous than the Dave app. I mean it's got all this legalese here that you can't even really tell, and that was enforced. In fact, it was enforced against a minor who signed up for the game.

THE COURT: But that's also -- Counsel, that's also -- that's what they have to agree to. They have to go through that. And do you happen to know if that is a -- is that an agreement where you have to actually scroll through to the end of it, albeit, whatever, you should do that in order to hit continue, or is it it just pops up like that?

MR. TOTINO: I don't believe it's is a scroll wrap agreement. I'm not 100 percent certain on that. I can maybe look while -- for Mr. Abramowicz's argument. But I don't think it was a scroll wrap agreement. It was a click wrap, I

guess you'd call it.

THE COURT: Okay. But regardless, it actually has, at least the start of the terms of the -- under the appearance to you, as opposed to just saying here's a link to them.

MR. TOTINO: That -- that is true, although -- yeah. I mean I guess there is a link in there.

THE COURT: Right.

MR. TOTINO: Yeah. I think that's accurate.

So if we take a look at the Selden versus Airbnb case, this is from the D.C. Circuit. This screenshot looks quite a bit like the Dave one. It's actually less clear because there are three separate buttons to sign up --

THE COURT: Um-hum.

MR. TOTINO: -- and the Court enforced this agreement and enforced the arbitration clause. And you'll notice, Your Honor, it doesn't say -- it doesn't say by signing up, I agree to arbitration. It says terms of service.

THE COURT: Right.

MR. TOTINO: In fact, there is no law, that I'm aware of, that says you have to note the arbitration agreement in the -- on the signup screen, as long as the terms of service are referenced.

Now, we have this -- this is the Edmundson versus the Klarna app, from the Second Circuit, just recently, last November. And as you can see there, it -- the button says

confirm and continue. And it says above it, I agree to the payment terms. This is even less -- less apparent that you're agreeing to terms, I think, than the Dave app. And it was enforced by the Second Circuit. Again, it was sent to arbitration, even though the -- it just says payment terms there. It's a hyperlink. It's underlined. It's not a different font color. It's just an underlined link like what Dave used, and it doesn't say anything about arbitration there until you click on the agreement and get to it. And that was enforced recently by the Second Circuit.

So what -- I think what -- we do have this case Berman versus Freedom Financial Network. And that's a Ninth Circuit case. It talks about font color preferences in an app, and it talks about you have to have blue font; and in our case, the font wasn't blue; it was underlined. But that -- you know, that case involved a specific situation with a honey pot kind of website that lured people in to receive marketing text. It wasn't a financial app. It wasn't someone entering into a long-term relationship with -- a financial relationship with the app -- with the company. And it -- it really doesn't cite California law or any other state's law. It's just the preferences from this Ninth Circuit panel decision.

Now District Courts in the Ninth Circuit, I guess, have to follow that because it says you have to use blue font. But, you know, it's not California law, which I think is what

this Court should follow. And it's also contrary to the Second Circuit Edmundson versus Klarna decision we just looked at because that -- that app didn't use blue font, and it enforced the agreement. It really didn't look at the full context, which -- in the totality of the circumstances, which is what I believe the law is.

Now, Plaintiffs make a number of arguments to avoid the arbitration clause. One of them is that they say the scope of the arbitration clause doesn't cover dispute or doesn't cover Dave. That's mainly directed on behalf of Mr. Checchia to the Extra Cash agreement. But the Extra Cash agreement actually has in there that the arbitrator decides the scope of the arbitration agreement, and -- it's in there twice, I believe. The other agreement also has that.

So if -- if -- if they were unreasonably conspicuous notice of the terms by signing up in the app, it's really for the arbitrator and not Your Honor to decide that. But even if Your Honor looked at it, the -- the account -- the spending account agreement and the deposit account agreement, if you click -- if you look at them in the record, they actually say -- they're called the Dave spending account deposit agreement and the Dave Extra Cash agreement. They say in there, Disputes between the consumer, Evolve Bank and/or Dave -- so it covers all three. And the case that the Plaintiffs rely on to avoid these -- these -- or to say this

-- that the account agreement doesn't apply to them was a case where Plaintiff sues Sunoco, the gas station company. And Sunoco tried to enforce a Citibank card agreement that didn't mention Sunoco once in it. And so that's why that was -- that case is totally distinguishable.

So in this case, we look at the agreements, they all mention Dave repeatedly in them. And again, that would be an issue for the arbitrator, we believe.

THE COURT: What about -- what about the case that was filed by Plaintiff in mid December as the totalitory -- that was actually a case against Dave, Inc., the Locust case out of the Ninth Circuit.

MR. TOTINO: Yeah. So what happened in that case is that case followed the Berman blue font rule that the Ninth Circuit had -- had. The Ninth Circuit decision, it's an unpublished memorandum, so it's not precedential. It followed the Berman -- like I said, the blue font standard from Berman. It also is -- a couple of the facts were a little different in that case for a couple of reasons. One is there wasn't any evidence in the record that Plaintiffs received e-mails linking the terms, which we have in the record here. And second, it didn't involve the second account agreement, the second sign-up process with the Extra Cash that Mr. Checchia did here.

I don't think that case is binding at all on this

court. Like I said, it's a panel -- it's an unpublished memorandum panel decision from the Ninth Circuit. Nothing in California law says you need to have blue font when you do a hyperlink. You know, here Dave used the underlined -- the underlined hyperlinks, which people are generally familiar with.

If you have any other questions, I'm happy to answer them. I will bring up one other case that Plaintiffs relied on. It's this Cullinane versus Uber Technologies case.

Yeah. So that one -- I'll stop sharing, maybe make it a little clearer here. Sorry.

So in the Cullinane versus Uber Technologies case, first of all, that was a Pennsylvania law case. All the agreements here say that California law or Tennessee law. So it shouldn't apply for that reason. Second, that case involved personal injuries, and it implicated the Pennsylvania Supreme Court rule and decision guaranteeing a right to jury trial in personal injury cases. That's not indicated here at all because we don't have a personal injury case.

In that case, the hyperlinks weren't underlined, by the way, like they were here. Also, another -- another point in that case is that the Plaintiff submitted substantial evidence that they didn't click on the hyperlinks or view the documents. All we have in this case is that the Plaintiffs didn't -- don't remember what they did. And then finally, I

would say that that case -- and I believe it's a petition to file further review in that case. But that case, it seems to say that if it's a personal injury case in Pennsylvania, you have to have an explicit jury waiver in a certain way.

Now since all arbitration agreements obviously involve jury waivers, I would argue that case treats the arbitration agreement differently and more harshly than a normal contract, and by because of that, it violates the Federal Arbitration Act. I'm sure that will be brought on the -- in the Petition that's filed for review in this case.

If you have any other questions, I'm happy to answer them, Your Honor.

THE COURT: Yeah. No, not right now. Thank you. I appreciate that.

Counsel, you can respond. But why don't we start with the question I have is why wouldn't California law apply here?

MR. ABRAMOWICZ: Sure. This is Kevin Abramowicz for the Plaintiffs.

So I think if the Court's going to go into the choice-of-law analysis, Pennsylvania law would apply. And the reason why I believe that is, so in -- and this is -- this is actually in White versus Sunoco; we cited it. Obviously we didn't address this proposition because Cullinane hadn't come out yet, and that really is the case that matters for whether

Pennsylvania law is different than California law.

But in White versus Sunoco, basically what that case says is that federal courts have to apply the form state's choice-of-law rules in diversity cases. Then we have Gay versus CreditInform. That's 511 F.3d, 369. It says that federal courts have to apply the state -- the form state's choice-of-law rules in federal question cases.

The reason that matters is we have federal claims here and we also have state law claims. But it doesn't matter. For both of those, we have to apply Pennsylvania's choice-of-law rules because it's filed in Pennsylvania.

So in Pennsylvania, the choice-of-law analysis turns on if there's a conflict between two laws, it turns on what state has a materially-greater interest in resolving that conflict, in resolving the issue before the Court. And for that, I'm citing McDonald versus Whitewater. The cite for that is 116 A.3d, 99. That's a 2015 case from the Pennsylvania Superior Court.

So the reason I think Pennsylvania has some material -- materially-greater interests in this case because Plaintiffs resided here, they got their advances from here, and they repaid them to Pennsylvania. So because of that, Pennsylvania would have the stronger interest than California in resolving this case.

Now I do know that Dave -- I believe what they

would argue is that the choice-of-law clauses and the contracts would prohibit the Court from engaging in that choice-of-law analysis. So what I would point the Court to for that proposition would be Kaneff versus Delaware Title Loans. The cite for that is 587, F.3d, 616. That's a Third Circuit case from 2009. It's published, so it's binding. And what it says is that choice-of-law clauses do not apply when either the law of the chosen state has no substantial relationship to the parties or the transaction, and there is no other reasonable basis for applying that law or application of the law of the chosen state is contrary to a fundamental policy of a state with a materially-greater interest in a particular issue.

So here, I think after applying that choice-of-law clause or to require California law in this case would violate that second -- that second statement in Kaneff, because if we apply the California law -- choice -- the California choice-of-law clause here, what we would be doing, given Cullinane is we would be applying a lesser standard of assent for contracts that seek to waive Constitutional rights than Pennsylvania Courts would apply.

In Kaneff, this is also important to note. Kaneff actually dealt with a use -- it was a usury case. So there, the challenge was to an unconscionable -- it was an unconscionabilty challenge. So it wasn't a formation

challenge to an arbitration contract. But the Court found that Pennsylvania's antipathy high interest rates, and that's in cite 624 for that case, meant that Pennsylvania law should apply to that unconscionability challenge.

So, you know, I think there's really two fundamental policies that would be frustrated here. One is our policy to high interest rates and high fees, and then the second would be our -- our higher burden of assent to contracts that seek to waive Constitutional rights.

THE COURT: Thank you, Counsel. And before I -- before you go into your response to the other arguments on the Motion to Compel, Mr. Totino, can you respond to that, the choice-of-law arguments?

MR. TOTINO: Yeah. I would say I -- I agree that the Court would have to look at who has a materially-greater interest. I don't -- I think the point about the policy against the high fees or high interest doesn't really apply because the evidence in the record is there's no interest and there's no -- no high fees. It's $3 a month or some minor couple of dollars. So I think that interest wouldn't apply.

As far as the interest on waiving the jury trial, as I mentioned, the interest in that comes from the Supreme Court -- Pennsylvania Supreme Court case about waiving a jury trial in connection with personal injury cases. That's not what we have here.

And then again, I would just emphasize that the Federal Arbitration Act, you know, would preempt treating arbitration clauses differently, which, you know, applying a different contract formation rules to the arbitration clauses because there's a jury trial waiver in every one of them, I think, would violate the FAA. Thank you.

THE COURT: Thank you. Mr. Abramowicz, you can continue.

MR. ABRAMOWICZ: Thank you. Before I continue, I just wanted to respond to two things. One, with the interest rate limitations, So even if -- so I think we dispute that the fees aren't actually interest. So the definition of interest is just something that compensates someone for loaning money. So that's what the charges are here, the monthly fee, the express fee and the tips are compensation for lending money. So they'd be defined as interest. But I mean I think the broader point is that the CDCA, so that's 7 P.S. §6203, it applies to not just interest, but it applies to fee discount bonus. I mean it really -- just anything that is charged in connection with an advance.

And I would like just -- if the Court looks to, for example -- and it's cited at paragraph 38 of our Complaint, the Department of Banking versus NCAS of Delaware. That's 948, A.2D, 752. That's a Pennsylvania Supreme Court case from 2008. That applied the CDCA to a monthly participation fee.

So, you know, it's -- our law is much broader than just being interest, even if -- even assuming that the charges here can't be qualified -- can't be characterized as interest. So that's the one point.

And then the point on the FAA, I don't want to belabor this, because it was, I believe -- well, actually, we might not have responded to the supplemental authority -- or to Dave's response to our supplemental authority for Cullinane. But I'll just -- there are two cases that are relevant to this point in the event we didn't. Morgan versus Sundance. That's a Supreme Court case from 2022. The cite for that is 142, Supreme Court, 1708.

So what that case says is that Courts must apply generally applicable rules, regardless if they disfavor arbitration or not. Here, we would argue that the rules set forth in Cullinane is a rule that applies to any waiver of a Constitutional right, regardless if it's a jury trial or something else. So it would fall within the scope of Morgan.

And I just also point the Court to Kernahan versus Home Warranty. That's a New Jersey Supreme Court case from 2019. The cite for that is 199 A.3D, 766. So that case dealt with a rule that's very similar to Cullinane, and the concurring opinion in that, I believe it was Justice Alvin rejected the claim of FAA or would preempt that type of rule.

So we think the rules set forth in Cullinane is

similar to that role. And I think the concurring opinion in that case gives a good road map of why the FAA doesn't preempt Cullinane.

THE COURT: Thank you.

Do you have any response to the Edmundson case that came out of the Second Circuit at the end of the year last year?

MR. ABRAMOWICZ: Yes. Yes, I do.

So in Edmundson versus Klarna, as opposing Counsel showed the Court on the PowerPoint, so that -- that dealt with a notice that was above the button that users were directed to click. And the notice was in the area of focus that users were directed to interact with.

So the reason that matters is when you have a notice that's above a button, I think you can fairly assume that because we read from top to bottom, that a consumer would compass that and read it, especially because it was close to the button that they were directed to click.

So our case is a lot different than that. The notice was placed below the button that users were directed to click. And not only was it placed below that button, but it was displayed in small green font, which blended into the background of the signup screen. It was considerably smaller than all the other fonts on that screen.

And I think it's important to note that a District

Judge in the Northern District of California agreed with me on that point. And then two Circuit Judges of the Ninth Circuit agreed with me, and another District Judge, sitting by designation, did agree with me on that Circuit.

And not only that -- not only was the -- so our notice was placed below the button; it was placed outside the user's area of focus; it was in gray font that blended into the background. It was smaller than all of the font on the screen. And the notice of the contract that Dave is trying to bind my clients to was labeled TOS. It was not labeled as a contract.

So Edmundson doesn't have any of those problems. It's placed above the button where users are directed to click. The font does not blend into the background. The payment terms are labeled payment terms. They're not labeled with letters. And the payment terms are bolded and underlined. And again, it's directly above the button that users are directed to click. So I don't think that that case is applicable here.

THE COURT: What about -- wasn't -- and I don't -- I'm trying to find it now. I know I have it somewhere and I don't have it right in front of me. It was on the PowerPoint.

With the second individual with which the -- not his original signup, but when he had the Extra Cash signup, wasn't that a box that he actually had to affirmatively click

to -- to accept the terms of service, as well, not just by saying by accepting this, I -- if I miss-saw that, I could be wrong. And I don't know if --

MR. ABRAMOWICZ: No. You're correct, Your Honor. That's -- so that's on paragraph 32 of -- it's paragraph 32 of the Hernandez declaration. And then it's, I believe, Exhibit I for that declaration.

THE COURT: Yes.

MR. ABRAMOWICZ: So -- but yeah, we're not challenging inquiry notice or -- or -- well, under California law. If you find California law applies, we would not be challenging whether there was assent there.

THE COURT: Okay. So do you -- you would agree it makes a difference because he checked that box. That's different there.

MR. ABRAMOWICZ: I think that California law would apply, yes.

THE COURT: All right. Go ahead. I think I interrupted you. So I apologize.

MR. ABRAMOWICZ: Oh, no. You're fine.

No. Actually, I think I was just -- I was just going to -- if you don't have any other questions, I just -- there was just a few points that I just wanted to highlight.

THE COURT: Yeah. Please.

MR. ABRAMOWICZ: Okay. So I think the way that --

after looking at all of the briefing again, rereading the cases, the way, at least, that I view the Motion is that Dave claims that he can compel arbitration in two ways: So one is by enforcing the Dave's terms of service against both of my clients; and then the second is by enforcing two deposit account agreements that were entered into with Evolve against Mr. Checchia.

So whether Dave can enforce those three agreements I think comes down to three issues. The first would be did Plaintiffs actually know they were agreeing to Dave's terms of service. Did the sign-up screen that they produced provide sufficient inquiry notice to bind my clients to Dave's terms of service. And then three, does the language of the deposit account agreements entered into with Evolve authorize Dave to enforce the delegation and arbitration clauses that are in those contracts.

And I think even if the Court views the evidence in the light most favorable to Dave, that it can answer all of these questions as no. And because of that, I think that the Court should deny the Motion to Compel with prejudice, without a trial, without discovery.

So on the actual notice point, the issue here is that Dave claims Plaintiff agreed to its terms of service by clicking a join Dave button when they signed up for Dave's app. So that's the method of assent. It wasn't a signature;

it wasn't checking a box. It was clicking a button. The purpose of that button was to join Dave.

So Dave -- the issue with actual assent, is Dave's produced no evidence that Plaintiffs knew that by clicking that button, they were agreeing to Dave's terms of service.

And I want to highlight that all of -- at least from what I can tell, all of the evidence that Dave produced has nothing to do with what Plaintiffs believed when they clicked that button. And that's what's necessary to show actual offense.

So the first piece of evidence that I could -- I could -- at least I thought Dave was trying to use was that Plaintiffs received and repaid advances, and that they paid express fees and tips. I got that from Doc 33, page 33.

So whether Plaintiffs received advancements, paid express fees, that has nothing to do with their knowledge of when they actually signed up for Dave's app and clicked that button, what they were thinking.

THE COURT: Can't you, in the rule, though, assent to the terms of the electronic agreement by -- through inquiry notice? Like, is there -- I mean isn't that at issue?

MR. ABRAMOWICZ: I agree. So here, I'm just addressing the actual --

THE COURT: I'm sorry about that.

MR. ABRAMOWICZ: Yeah. Yeah. So I agree that

there's two roads -- two roads we can go down. So one, you can show actual notice, and then two, you can show inquiry notice. So even if Dave can't prove actual notice, it could still show inquiry notice and bind -- bind my clients if it can sufficiently show that.

But just on the actual notice part, I don't think that Dave has submitted any evidence that placed that at issue. So a second piece of evidence that I could tell from the briefing was that Plaintiffs are -- and this is quote, Reasonably active adult consumers; that's from Doc 33, page three. Again, that has nothing to do with what they believed when they clicked the Join Dave button, which is the method of assent that Dave claims bound my clients to the terms of service.

The third piece of evidence was that Plaintiffs have filed other lawsuits. I got that from Doc 33, page three and page four. So again, that has nothing to do with their subjective mindset when they signed up for Dave's app. And the one thing I want to point out with that piece of evidence, if anything, it actually helps my clients, because in Dave -- Dave cited two cases on that. One was Checchia versus Solo Funds. The other was Golubiewski versus Activehours. So Checchia versus Solar Funds, the Court found that my client did not assent to any arbitration contract. And the cite to that is -- it's only a district -- it's a Lexus cite, but it's

2023, US District, Lexus 98889. And the docket number for that is 23-CV-444. I do want to, in all candor to the Court, that case is currently on appeal and argument is tentatively scheduled for May 20th.

But the District Court found that my client didn't assent. So that wouldn't have helped Dave. And then in Golubiewski versus active hours, there is no arguments that my clients assented to an arbitration contract.

So the fourth piece of evidence that I could find was that Plaintiffs are, quote, Experienced mobile phone users who create accounts on mobile apps. I got that from Doc 33, page three and page four. Again, that has nothing to do with their subjective mindset on what they believed when they clicked on the join Dave button.

And in today's presentation, I got two other pieces of evidence that I think Dave claims shows actual notice. One is that my clients gave access to their bank accounts. Again, that's not relevant to what they believed when they clicked the Join Dave button. And the sixth piece of evidence would be that they received e-mails. The problem is that Dave hasn't actually produced those e-mails. So we don't know what they said, what they reference, where the language of the terms of service was. So that's not helpful to understand what they believed.

And we cited, I believe in our briefing, it was

Jackson versus Amazon. That was a Ninth Circuit case that dealt with a similar situation that said that type of evidence is insufficient. So -- and this is just a point that I wanted to -- we addressed in our briefing, but I just wanted to reiterate that, and this is still on the actual notice part, is that a party -- and this is a quote from a Third Circuit case. I'll just give you the citation. It's 110 F.3d, 222. And then the Penn cite is 231, Note 36. It's a Third Circuit case from 1997. And the quote is, A party does not become entitled to a jury trial under the FAA merely by demanding one. Instead, the party must demonstrate that there is a genuine issue of facts whether there was an agreement to arbitrate.

So again, without producing any evidence on the actual notice part, Dave has not placed that at issue, so there's no need to have a trial on that issue.

THE COURT: Were you going to turn to inquiry notice next?

MR. ABRAMOWICZ: I was.

THE COURT: All right. Let me -- why don't I hear from Mr. Totino on the actual notice issue before we hear on -- the argument on inquiry notice.

MR. TOTINO: Thank you, Your Honor. So actual notice, we have in Ms. Hernandez's declaration, page 10, or paragraph 10, it says, In addition, Dave sends regular e-mails

to customers which notify customers of Dave's terms and provides links for customers to view the terms.

So that's in the record. Plaintiffs rely on Jackson versus Amazon dot com to get around that, but -- and in that case, Jackson versus Amazon dot com, the issue was whether new terms applied, not whether there was notice of any terms -- actual notice of any terms, which is the issue here.

So I think Jackson is a -- what they were trying to do is to bind the Plaintiff with the new terms, but the Plaintiffs didn't get the e-mail, apparently, and they have evidence saying that, as far as I remember.

And here, we're not saying -- we're saying the e-mails put the Plaintiffs on actual notice that there are terms. And, by the way, the record -- there's no -- nothing in the record with Plaintiffs saying they didn't get these e-mails. So the only evidence in the record is that these e-mails were sent; things that are sent are presumed to be received; and the Plaintiffs don't submit any evidence saying they didn't get them.

Also on this actual notice, I don't believe that actual notice is determined only at the time when the Plaintiff first signs up the app and clicks on the Join Dave button. I do think there's actual notice there because it says by joining Dave, you're agreeing. But once you --

THE COURT: Does it -- does it matter, as Counsel

say, whether the -- that language is above or below the click of the button?

MR. TOTINO: I don't think so. If you look at a smart phone and you're looking at the phone, it's all on one screen. You don't have to scroll. And it's a screenshot. You look at that, and if it says above or below, some -- some cases do it -- companies do it one way, others do it the other way. You know, I -- I guess what I would say is the best possible notice isn't required. It just has to be a notice. And here, it says Join Dave. Anyone looking at the phone there would see that there's language, By agreeing underneath -- By joining, I agree underneath the button. And I don't think there's any case law that says that it has to be above that I've seen.

Just on -- on one last point of his actual notice is I don't think the notice has to be limited to just when they first sign up for the app. If you're going into a relationship with the -- with a company, getting multiple advances over a long period of time, paying that back, paying tips, that's -- that gives you actual notice that you have some type of an agreement with -- and loans through actual notice of the agreement, it was their obligation to click on the link in the app or otherwise take a look at the agreement, because not reading the agreement is no excuse to not being enforced against a person. Thank you.

THE COURT: Thank you.

Counsel, let's hear about inquiry notice.

MR. ABRAMOWICZ: Yes. That's a good segue, actually, because I think really what the actual notice argument here is that there was inquiry notice because what -- kind of the same that we can assume that a person knew that contract governed because of X, Y, or Z really is -- they were on constructive notice and they should have found out.

So I think that's really what the issue is here, is that Dave is claiming that there's inquiry notice. That's really what all of their evidence goes to. And I think, even if you view that evidence in the light most favorable to Dave, it shows that inquiry notice is lacking on here.

And I want to stress that I am not the only person that's saying that. Four judges from California have said that, as well. And I think those opinions are well-reasoned. And in arguing that it gave notice, Dave is saying that those judges got it wrong. But if we just look at Dave's screen, I think those judges got it right.

So, you know, even -- I mean even if we contrast the notice here with the -- and just hold on one second. Bear with me.

THE COURT: Yeah. Sure. Take your time.

MR. ABRAMOWICZ: So if we look at -- and what I'm looking at right now in front of me is Exhibit G and Exhibit F

to actually Hernandez's declaration. It's for -- if anyone has the pdf up, it would be page 16 -- or page 70 of Doc 13-1. And then page 72 of Doc 13-1.

THE COURT: Thank you.

MR. ABRAMOWICZ: So for these -- if we look at these two screens, one of the screens is designed, at least under California law, to give someone notice of terms. And one of the screens is not. And the screen that's not is the one that my clients saw.

So I would also note that Exhibit G, unlike Exhibit F is blown up. So Exhibit F is more of the size that someone would see. Exhibit G is not -- is not the same size that someone would see. I would refer the Court back to Ashley Hernandez's declaration. If you actually look at the paragraph where Exhibit G is discussed, you'll actually see what's more like a cell phone size of what someone would have seen.

So the -- and I kind of already went through this, but the problem here is that -- so Exhibit G, if we're looking at the notice, it's placed below the button. In Exhibit F, we're looking at the notice, it's placed above the button. Exhibit G, if we're looking at the notice, it says TOS. Exhibit F, if we are looking at the notice, it says terms of use. So it's clearly a contract in Exhibit F; Exhibit G, the thing that my clients saw, is not.

And on top of that, Exhibit G, the screenshot that my clients saw, the notice is in gray font that blends into the background. In Exhibit F, it is bolded, and it is highlighted in blue. And it contrasts directly with the background.

So all of these things go to show how these two screenshots really prove that assent inquiry notice is lacking here, even under California law, the law that they claim applies.

THE COURT: Mr. Totino?

MR. TOTINO: Yes. So on that, Your Honor, like I said, you know, the notice doesn't have to be the best possible. It just has to be reasonable notice. If you look at the Klarna screen, it's got the same kind of -- the same color font, basically, which the Second Circuit enforced.

I think there's -- there's certainly enough here to create an issue of fact as to whether Plaintiffs had inquiry notice. I will note that the Plaintiff mentioned the different judges that reach the different conclusions. In the Lopez case, if you look at insight to the Lopez case, it says, But there was no record of any attempt to communicate the arbitration provision outside the initial language of the Dave application signup screen.

But here, we do have evidence from Mr. -- from Ms. Hernandez's declaration that they were sent periodic

e-mails with links to the terms. So I think, at the very least, that creates a triable issue of fact on whether Plaintiffs had notice. And although I think it's clear from the record that, you know, Plaintiffs didn't, and the arbitration motion should be granted.

Was Plaintiff finished with his whole argument or does he want to respond?

THE COURT: I'm not sure. Counsel?

MR. ABRAMOWICZ: Yes. So -- so again, the -- they didn't provide the e-mails, so we don't know what the e-mails look like. So I know that the argument is that the e-mails contained hyper links, but, I mean even if you view the light -- the evidence in the light most favorable to Dave, we don't know what those e-mails look like. So we don't actually know what -- you know, what kind of notice they gave, if they gave any notice at all. I mean the hyperlink could have been labeled Tuesday or Friday or Monday. It could have been something that has no -- no relation to a contract at all.

So the problem is is that the e-mails, themselves, there's just no notice of what they said. We need to see what they said to be able to analyze inquiry notice. And I think Dave -- the Lopez, the Ninth Circuit case made clear that inquiry notice is a question of law for the Court to decide.

So there's no, you know, again, if you're looking at the evidence in the light most favorable today, and the

screens are what they are, they give the notice that they give. So that's not a triable issue of fact. The Court can decide whether the maker of that screen gives notice or not.

And on the point that, you know, they don't need to give the best notice possible, they just need to give reasonable notice. I agree with that, but there has to be some limit to that test. And, you know, I think what the arguments really are here is that there is no limits on that site, because people know that contracts are going to govern. So then the -- whatever contract the Defendant wants to apply to that specific transaction will apply, regardless of what they do. And that's just not the standard.

There has to be some type of notice that they have to give. And this case just does not meet that standard.

THE COURT: Thank you, Counsel. Mr. Totino, anything else?

MR. TOTINO: Yeah. Just in concluding, Mr. Abramowicz just said there has to be some type of notice. Here, it's clear there was some type of notice. It was in the app. It was in the e-mail. At the very least, I think it creates a triable issue of fact on that point, and we should -- we should try when the Plaintiffs had notice.

I had one other point that just slipped my mind. Just one second. I would just say, you know, if you look at the screens, I think any reasonable consumer looking at that

screen would know there's some agreement governing the relationship. And actually, that was the point.

The fact of this long, ongoing financial relationship doesn't mean that you have to -- that you can just say there's terms that we never showed you and we never give you any idea of, and those are binding. It just affects how much notice -- whether the notice is sufficient. If you have an ongoing financial relationship, you need less -- probably less explicit notice than if someone went to a website to sign up for marketing texts because, you know -- you should know there's an agreement there. And because of that, the notice doesn't have to be conspicuous. It doesn't have to be perfect. It's -- you know, it just has to be reasonable. And we think we've met that standard here.

THE COURT: Do you say there's a triable issue -- if the Court were to find a triable issue has been met there, are you saying there should be a trial on the issue of notice prior to a decision on the Motion to compel arbitration?

MR. TOTINO: No. What I'm saying is that, Your Honor, I think, can grant the Motion to Compel Arbitration based on the record in front of you. But at the very least, I think there's -- if there's disputes of fact, things like, for instance, whether these e-mails, Plaintiffs received them. He said they could have sent Monday or Tuesday. They have them. They could have brought that up. If there's issues of fact, I

think the FAA requires a trial on whether or not an agreement was ever entered.

THE COURT: Okay. Thank you. Mr. Abramowicz, anything else?

MR. ABRAMOWICZ: Just two final points, Your Honor.

THE COURT: Go ahead.

MR. ABRAMOWICZ: So on the Evolve deposit account agreements that -- that -- this is just for Mr. Checchia. So I think White versus Sunoco is pretty on point. I'm not going to go back over that case. We cited it already. But I understand that Dave is trying to distinguish it because Dave is saying that it's specifically named in the agreement.

So to the extent that Your Honor would like to look at another case that involves that exact issue, it is Cablovic, that's C-a-b-l-o-v-i-c, and that's versus JC Penney. The cite for that is 884, F.3d, 1051. That's a Tenth Circuit case from 2018. So in that case, the contract stated if either you or we elect or make a demand for arbitration, you and we must arbitrate any dispute or claim between you or any other users of your account, and us, our affiliates, agents, or JC Penney Corp., Inc, if it relates to your account.

So the we, the us was GE Bank, GE Capitol Bank; the Defendant was JC Penney. And despite the fact that claim was defined specifically to include JC Penney, the Tenth Circuit held that JC Penney could not compel arbitration because only

we, in quotes, GE Bank could compel arbitration, and JC Penney could not qualify. So that's directly on point here and addresses the attempted distinction that Dave is making with White.

I have -- and then just one final point on whether a trial is necessary.

Again, if you look at the evidence in the light most favorable to Dave, it still does not raise an issue of fact on actual notice, and it still shows an inquiry notice is lacking. So there's no point to have a trial under that standard. I think the -- I believe we cited this case in our -- in our briefing. But Bazemore --

THE COURT: Um-hum.

MR. ABRAMOWICZ: -- that's -- versus Jefferson Capital. I think that was in there. That was 827, F.3d, 1325. That's an 11th Circuit case from 2016, and it cites a Third Circuit case from 2013 for that point.

THE COURT: Great. Thank you.

All right. Well, Counsel, thank you both very much for the presentation and the arguments on this. I think they're helpful to clarify these issues. Certainly this is -- these are Motions that are -- well, although a year old, not the oldest I've recently inherited. So I will -- we will be looking at these as quickly as we can. Argument was helpful to me to clarify some of the issues here and -- and streamline

the argument.

So I appreciate you taking the time to do this with me today, and I hope that you'll hear from me soon.

MR. ABRAMOWICZ: Thank you, Your Honor.

MR. TOTINO: Thank you, Your Honor.

THE COURT: Have a good day.

(At 1:59, the proceedings were concluded.)

CERTIFICATION

I, Colleen V. Wentz, Federal Official Realtime Court Reporter, in and for the United States District Court for the Middle District of Pennsylvania, do hereby certify that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically-reported proceedings held in the above-entitled matter, and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United Sates.

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